SUPREME COURT, U. S.

JAN 21 1974

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-714

ETHEL IMEL, SHIRLEY SHAW, and NETTIE AMATO,
*Petitioners,*

v.

ZOHN MANUFACTURING COMPANY, formerly known as GROSS WHOLESALE TAILORS, INC., a Colorado corporation; LOCAL 263, AMALGAMATED CLOTHING WORKERS OF AMERICA, a Labor Organization; MIDWEST REGIONAL JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization; and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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ETHEL IMEL, SHIRLEY SHAW, and NETTIE AMATO,
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v.

ZOHN MANUFACTURING COMPANY, formerly known as GROSS WHOLESALE TAILORS, INC., a Colorado corporation; LOCAL 263, AMALGAMATED CLOTHING WORKERS OF AMERICA, a Labor Organization; MIDWEST REGIONAL JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization; and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners Ethel Imel, Shirley Shaw, and Nettie Amato respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 21, 1973.

## OPINION BELOW

The opinion of the Court of Appeals is reported in 481 F.2d 181 and Appendix A hereto.

The judgment of dismissal of the District Court is not

reported. The District Court issued two written judgments: the first, filed July 20, 1972, and listed as having been filed under that date in the docket entries of the District Court, is attached hereto as Appendix C, was duly mailed to counsel for the parties, but was not certified as part of the Record on Appeal; the second, dated July 7, 1973, was neither listed in the docket entries of the District Court nor mailed to counsel for the parties, but it was certified as part of the Record on Appeal and is appended hereto as Appendix D.

## JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 21, 1973. A timely petition for rehearing en banc was denied on August 2, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether employees, as plaintiffs in an action based upon collusion by their employer and the labor organizations representing the employees to prevent implementation of the wage and arbitration provisions of the collective bargaining agreement, may proceed under Section 301 of the Labor Management Relations Act of 1947 against the labor organizations for breach of the duty of fair representation without having exhausted the internal appeal remedies afforded by the constitution and by-laws of the superior labor organizations to plaintiffs as members of the subordinate local union.

## STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

. . . . .

(e) For the purposes of this section, in determin-

ing whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c.120, Title III, § 301, 61 Stat. 156.

## STATEMENT OF THE CASE

Plaintiffs, the present petitioners, brought an action in the District Court for the District of Colorado against their employer (Respondent Zohn Manufacturing Company), their local union (Local 263, Amalgamated Clothing Workers of America), and its regional and national organizations (Midwest Regional Joint Board and Amalgamated Clothing Workers of America, AFL-CIO). Jurisdiction was asserted under The Labor Management Relations Act of 1947, § 301. Petitioners asserted that their employer had violated the collective bargaining agreement by paying them substantially less than the contract provided and that the unions had breached the duty of fair representation by concurring in the underpayment and by corruptly agreeing with the employer that, after plaintiffs had filed grievances based upon the wage claims, arbitration of those claims would not take place as provided in the contract. Under the contract, the union bargaining representatives (Local 263 and Midwest Regional Joint Board) had the sole power to invoke the arbitration procedure. The employer filed an answer in which he asserted the defense that plaintiffs had failed to state a claim. The unions filed motions for Summary Judgment in which they asserted that the District Court had no subject matter jurisdiction of the complaint for the reason that plaintiffs were members of Local 263 and were thus bound by the constitution and by-laws of Amalgamated

Clothing Workers and of the Midwest Regional Joint Board, that those governing instruments provided internal union appeal remedies from the complained of actions of the unions, including an expedited appeal to the General Executive Board of Amalgamated, that plaintiffs had not pursued those remedies, and that the governing instruments prohibited plaintiffs as members of Local 263 from instituting a civil action without so pursuing those remedies. Plaintiffs filed an affidavit in which it was alleged that repeated demands had been made upon Midwest Regional Joint Board officials that their wage claims be arbitrated; plaintiffs admitted that they had not appealed to the General Executive Board of Amalgamated.

The District Court entered a Judgment of Dismissal as to all defendants. The Court of Appeals reversed this judgment as to the employer, but affirmed the judgment as to the defendant unions on the grounds that plaintiffs had an expedited internal appeal to the General Executive Board of Amalgamated which they had not pursued, that the Constitution of Amalgamated required plaintiffs, as members of Local 263, to exhaust the internal appeal procedure before instituting any civil action against Amalgamated, its local unions or joint boards, and that such exhaustion is a prerequisite to the institution of any civil action.

## REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS IMPOSED SUBSTANTIAL LIMITATIONS UPON ENFORCEMENT OF THE DUTY OF FAIR REPRESENTATION; THESE LIMITATIONS ARE INCONSISTENT WITH THE APPLICABLE DECISIONS OF THIS COURT.

This Court has, in several opinions dealing with the prob-

lems of fair representation suits, touched the periphery of the question presented in this case; the decision of the Court of Appeals conflicts with the clear implications of those cases.

(a) In *Vaca v. Sipes*, 386 U.S. 171 (1967) this Court held that employees could join their employer and their bargaining representative in a single action under Section 301, Labor Management Relations Act where the cause of action against the employer was founded upon violation of the collective bargaining contract and the cause of action against the bargaining representative was founded upon breach of the duty of fair representation. The Court, in so holding, made several observations justifying its holding; the Court of Appeals in the present case has ignored those observations. The Court of Appeals in the present case has, in effect, relegated employees who seek redress against both employer and union under the holding in *Vaca v. Sipes, supra,* to two different forums; *Vaca v. Sipes* has, 386 U.S. at 187 ennunciated a policy against multiplicity of forums to adjudicate employee's claims where, as in the present case, the union's breach of duty "will have enhanced or contributed to the employee's injury". In addition, *Vaca v. Sipes* ennunciated a strong policy of allocating responsibility for the creation and application of a remedy for the victim of union breach of duty to the courts; the Court of Appeals has given this responsibility to an internal union tribunal.

(b) In *Glover v. St. Louis-San Francisco Ry. Co.* 393 U.S. 324 (1969), this Court recognized the anomaly of a rule that, in cases involving misconduct on the part of a union, would assign to that union the administration of a remedy for the wrong. The Court observed, 393 U.S. at 331, such a rule "would only serve to prolong the depriva-

tion of rights to which these petitioners according to their allegations are justly and legally entitled." The Court of Appeals has failed to appreciate the distinction, implicit in the *Glover* case, between actions based on the contract against the employer where the employer defends on the ground that the employee or his representatives have not followed the grievance and arbitration procedures of the contract, and cases, like the present, where it is the union conduct which is impugned but the same union nevertheless claims the prerogative of enforcing the rights of the employee.

(c) This Court has stated, in *NLRB v. Shipbuilding Local 22*, 391 U.S. 418, 424-425 that where the public interest is involved, as it is in the adjudication of the allegations made by the present petitioners, restrictions imposed by the union constitution upon an employee's seeking redress must give way. The Court of Appeals in the present case has abdicated its duty to protect this public interest.

2. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LAW NOT SETTLED BY THIS COURT; THE QUESTION SHOULD BE RESOLVED BY THIS COURT BECAUSE THE COURT OF APPEALS APPEARS TO HAVE CREATED A POLICY INCONSISTENT WITH OTHER POLICIES OF FEDERAL LABOR LAW.

In the cases following the holding of *Republic Steel v. Maddox*, 379 U.S. 650 (1965), employees have generally been held to a duty to exhaust contract grievance procedures before subjecting the employer to an action based upon the contract. The rationale for the *Maddox* doctrine has no bearing upon the facts of the present case, and the holding of the Court of Appeals in the present case conflicts

with the policy of national labor law to neither encourage nor discourage employees with respect to union membership. The rationale for imposing the burden upon the present petitioners of exhausting the internal appeal procedures set forth in the constitution of their national union was that their membership in Local 263 of that union bound them to comply with the provisions of the constitution of Amalgamated. The Court of Appeals has thus created two classes of plaintiff in actions permitted by *Vaca v. Sipes, supra,* union members and non-member employees represented by a collective bargaining agent. The non-members would be permitted to seek an immediate judicial remedy. The union members are subjected to the ambiguities of union governing instruments (cf. *Steib v. New Orleans Clerks & Checkers, Local 1497,* 436 F.2d 1101 (5th Cir., 1971), and the vagaries of procedures administered by union officials in distant places. Those who have fashioned the employee's remedy for breach of the duty of fair representation cannot have intended such a result.

## CONCLUSION

The Court of Appeals for the Tenth Circuit, in its ruling in the present case, has imposed substantial limitations upon the right of employees to join employers and unions as defendants in a single action. In so doing, the Court of Appeals has ignored the doctrines of the decisions of this Court applicable to such actions. In addition, the Court of Appeals has decided a question of substantial importance to a basic tenet of the law of labor relations; the precise question decided has not been decided by this Court. A writ of cer-

tiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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October 29, 1973

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAY, 1973 TERM

ETHEL IMEL, SHIRLEY SHAW, and NETTIE AMATO, *Plaintiffs-Appellants,*

v.

ZOHN MANUFACTURING COMPANY, formerly known as GROSS WHOLESALE TAILORS, INC., a Colorado corporation; LOCAL 263, AMALGAMATED CLOTHING WORKERS OF AMERICA, a Labor Organization; MIDWEST REGIONAL JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization; and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization,
*Defendants-Appellees.*

No. 72-1592
Filed
June 21, 1973

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO**
(C-3556)

CRAIG A. MURDOCK, Denver, Colorado, for plaintiffs-appellants.

ROBERT BUGDANOWITZ, Denver, Colorado, for defendant-appellee Zohn Manufacturing Company.

EDWARD J. SCHEUNEMANN, Denver, Colorado, for defendants-appellees LOCAL 263, Amalgamated Clothing Workers of America and Midwest Regional Joint Board.

JOHN A. CRISWELL, Englewood, Colorado, for defendant-appellee Amalgamated Clothing Workers of America, AFL-CIO.

Before HILL and BARRETT, Circuit Judges, and TALBOT SMITH, Senior District Judge*

PER CURIAM

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The controversy before us arose between three plaintiff-employees and four defendants: their employer, Zohn Manufacturing Company (Zohn), Local 263, Amalgamated Clothing Workers of America, the plaintiffs bargaining representative (Local 263), Midwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO (Joint Board), and Amalgamated Clothing Workers of America, AFL-CIO (Amalgamated). Jurisdiction was asserted, in part, under Section 3 of the Taft-Hartley Act (29 U.S.C. §185). The matter comes to us upon the dismissal of the complaint resulting from rulings upon Motions for Summary Judgment filed by defendant Unions and a Motion to Dismiss incorporated in defendant Zohn's responsive pleading to the action.[1]

The complaint embodies four separate claims for relief in a court action, despite the existence of a contractual grievance remedy, as well as constitutionally-based internal ap-

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*Eastern District of Michigan, sitting by designation.

[1]After argument upon the motions the complaint was dismissed. The trial court's written Judgment of Dismissal dated July 7, 1972, was based upon the grounds that "applicable administrative procedures available to plaintiffs have not been exhausted." A later Judgment of Dismissal dated July 20th varies somewhat in phraseology, referring to failure to follow "administrative procedures adopted in the collective bargaining agreement," but

peal procedures within the unions themselves. The controversy stems from defendant Zohn's alleged failure to pay the wage claims of the plaintiffs. Zohn had entered into a collective bargaining agreement with Local 263 and the Joint Board covering plaintiffs' wages and working conditions. It had allegedly breached the agreement, specifically by underpaying the plaintiffs. Plaintiffs thereupon entered a grievance but, it is alleged by plaintiffs, Zohn, Local 263, and the Joint Board improperly and unlawfully refused to process plaintiffs' wage grievance through the grievance settlement and arbitration procedures set up in the collective bargaining agreement, despite plaintiffs' demands therefor.[2] This refusal, it is alleged, resulted from improper concert of action among the defendants, malicious and willful in its motivations.

In *Vaca v. Sipes,* 386 U.S. 171 (1967) the Supreme Court held that employees subject to a union contract might institute suit against labor unions in those situations wherein it was claimed that the employer had violated the provisions of the union contract and the union had violated its duty of fair representation to the employees. It was further held that an employee charging a union with violating the duty of fair representation would not be required to exhaust the contract's grievance procedures, provided that under the contract the union has the sole power to invoke those procedures and that the employee has been prevented from utilizing these procedures through the union's wrongful conduct,

[2]Arbitration of plaintiffs' job-classification issue had been agreed to "by the Company and your Union" (Ex.G) but plaintiffs insisted upon arbitration of the wage issue as well (Ex.H.)

in view of the court's holding from the bench that plaintiffs "must follow and complete the administrative procedures provided by the Constitution, by-laws of their Union" (App. Vol. I, p. 22) we do not regard the differences in phraseology as material. cf., Texaco, Inc. v. Holsinger, 336 F. 2d 230 (10th Cir. 1964).

the circumstances indicating that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes, supra,* at 190.

The defendant Unions before us each filed a motion for summary judgment, supported by affidavit and other documentary evidence, setting up, among other grounds, that plaintiffs had failed to exhaust the internal union remedies granted them by the constitutions of the unions involved.

The remedies provided under the constitution and by-laws of the Joint Board and Amalgamated are straightforward and comprehensive. The plaintiffs are members of Local 263. As such they are bound by the constitution and by-laws of the Joint Board and Amalgamated, under which Local 263 is an affiliated and subordinate body.[3] Furthermore, as such members they have both the "obligations and privileges" enunciated in the constitution and by-laws.[4]

In addition each member authorizes "the Amalgamated and/or his local union or joint board" to act as his agent in order to "represent and bind him in the presentation, adjustment and settlement of all grievances."[5]

It is also provided that each member has the right of appeal set forth in Art. XII "from any action or failure to act of his local union or joint board in the presentation, adjustment and settlement of any such grievance, complaint or dispute . . . ," in the exercise of any local or joint board's original or appellate jurisdiction under that Constitution. As we read the instruments before us we take it that the appellate procedure is to appeal first to the local level, then to the joint board, then to Amalgamated itself. However, Section 2 of Article XII (the Appeals Article) permits a

[3]Art. VII, Amalgamated Constitution.

[4]Id. Art. IX, Sect. 3.

[5]Id. Art. IX, Sect. 9b.

direct appeal to the General Executive Board of Amalgamated without undertaking the intermediate steps. And, finally Section 5 of Article XII specifically requires any member to exhaust the appeal procedure provided by the Constitution before instituting "any civil action, suit or proceeding in any court against the Amalgamated, any of its local unions or joint boards . . ."

Such exhaustion of the internal appeal procedures was not had in this case. The reasoning therefor was that the officers and agents of Local 263, and the Joint Board, had prior knowledge of the facts involved in the complaint. However that may be, the fact remains that the officers of Amalgamated were in no way involved,[6] no charges had been made against them, there is neither allegation nor proof that resort to them would have been futile, and there appears on the record before us no justification for plaintiffs' failure to appeal to Amalgamated itself, as authorized by Article XII, Section 2, supra, of the Constitution.

We recognize that here we deal with a question of the exhaustion of internal constitutional remedies, as distinguished from contractual remedies, such as arbitration. Differences are, of course, present, thus the one remedy may arise by contract, the other by membership. Yet there is a basic, underlying principle involved here, upon which much of labor-management harmony turns, namely, staying the hand of "judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own internal affairs." *Brady v. Trans World Airlines,* 401 F.2d 87 (3rd Cir. 1968), cert. den., 393 U.S. 1048 (1969). Here we find in

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[6]Such was conceded at oral argument by plaintiffs' counsel: "It is true we do not suggest that any employee or officer of Amalgamated as such had anything to do with the events which led to the filing of this Complaint." Record, Vol. I, p. 11.

the governing documents of the Unions provisions for careful review of grievance procedures, including an expedited appeal to the General Executive Board of Amalgamated. The by-passing of the carefully enunciated review measures, absent a clear and positive showing of futility, can only promote disharmony in the field of labor-management relations. Whether a union's "opportunity to resolve disputes concerning its own internal affairs" arises and is accomplished through contractual or constitutional means should not control attainment of the objective sought. A reasonable opportunity should be afforded in either event.[7] Such, in fact, was the holding in the case of *Harrington v. Chrysler Corporation,* 303 F. Supp. 495 (E.D., Mich. 1969) where it was held that,

> "It appears from the facts presented that the extra-judicial remedies available to plaintiff Harrington are two-fold in nature: (1) those procedures set forth in the collective bargaining agreement between Local Union 412 and Chrysler Corporation, and (2) those intra-union appeal procedures set forth in Article 32 of the Constitution of the International Union. It is no excuse that it would have been futile to present plaintiff's grievances to the local officers. The plaintiff was obliged to comply with the intra-union appeal procedure and absent such compliance, the courts lack jurisdiction to hear the complaint." [cited cases omitted]
>
> "In the case at bar, plaintiff Harrington sought redress only by means of the grievance machinery set forth in the local collective bargaining agreement between Local Union No. 412 and Chrysler

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[7]cf. exhaustion requirements in the Landrum-Griffin act, 29 U.S.C. §411.

> Corporation. He did not avail himself of the intra-union appeal procedures to challenge Local 412's alleged arbitrary action in refusing to represent the plaintiff with respect to the grievance. The intra-union appeal procedures set forth in Article 32 of the Constitution of the International Union require the aggrieved member to submit his appeal in writing within a specified time period following the alleged action and further require that all remedies and appeals under the International's by-laws be exhausted prior to commencement of any appeal to a civil court or government agency for redress." 303 F. Supp. at 497.

To the same effect see *Bsharah v. Eltra Corporation,* 394 F.2d 502 (6th Cir. 1968); *Dill v. Wood Shovel & Tool Co.,* 68 LC § 12,685 (D.C. Ohio 1972); *Harris v. Continental Aviation & Engineering Corp.,* 67 LC § 12,393 (D.C. Ohio 1972); *See v. U.A.W. Local* 417, 69 LC § 13,165 (D.C. Mich. 1972).

It is clear that in the matter before us there has thus been a failure to exhaust the internal remedies available to all members under the Constitution, such exhaustion being a pre-requisite to the institution of any civil action. The trial court's grant of defendant Union's motions for summary judgment accordingly is affirmed.

With respect to defendant Zohn, the employer, the case stands on a different footing. The gravamen of the plaintiffs' cause of action is the alleged corrupt and concerted failure of defendant unions and the employer to undertake and carry through to completion an honest and fair arbitration of their wage claims, properly initiated by them, but "at the higher stages" of the grievance and arbitration proce-

dure "frustrated by the concerted action of Zohn and the defendant unions," citing *Vaca v. Sipes, supra.* Zohn replies that the agreements between the unions and the company resulting in an abandonment of arbitration of the wage claims were honest and fair, and, moreover, within their permissible power to screen grievances, also relying on *Vaca v. Sipes, supra.* Zohn urges, as well, that plaintiffs' allegations that defendants had agreed that the grievances submitted by plaintiffs "would not be processed in accordance with the provisions" of the collective bargaining agreement,[8] Zohn argues that no details are provided as to the procedures in the collective bargaining agreement, "or in what manner the parties agreed to the contrary," asserting that "a litigant must give the Court some idea of the basis of filing an action" other than mere conclusions.

The obstacles to affirmance of a dismissal of a complaint on such grounds are formidable. The pleading deficiencies, should such they be, are not fatal to plaintiffs' cause of action. Where a complaint gives fair notice of the grounds for the plaintiffs' claims, and it cannot be said with certainty that proof of any facts in support thereof would entitle the plaintiffs to no relief, it should not be dismissed for uncertainty. 2A Moore's Federal Practice, ¶12.08, at 2271-2285 (2d ed. 1968). The pre-trial and discovery devices now available offer sufficient protection against ambush at trial. The Supreme Court's ruling in *Czosek v. O'Mara,* 397 U.S. 25 (1970) makes this clear, if any doubt based upon other precedents, had theretofore existed. The Court held,

> "Although the complaint was not as specific with regard to union discrimination as might have been desirable, we deem the complaint against the union sufficient to survive a motion to dis-

[8] Paragraph X, Complaint.

> miss. As the Court of Appeals indicated, 'where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation,' complaints should be construed to avoid dsimissals and the plaintiff at the very least 'should be given the opportunity to file supplemental pleadings unless it appears "beyond doubt" that he cannot state a good cause of action'." 397 U.S. at 27.

The plaintiffs here, as well, should be given a similar opportunity.

The dismissal of the Complaint is accordingly reversed and the case remanded. As we have held heretofore, the grant of the motions for summary judgment is affirmed, but the grant of Zohn's Motion for Dismissal is reversed and upon remand plaintiffs should be allowed to amend their complaint to allege circumstances supporting their assertion that attempts to pursue their grievances would be futile.

Under the views we have taken of the case we do not reach the additional issues presented.

So ordered.

Affirmed in part and reversed in part for further consideration not inconsistent with this opinion.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JULY, 1973 TERM — AUGUST 2, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges, and Honorable Talbot Smith, Senior District Judge*

(*Of the Eastern District of Michigan)

ETHEL IMEL, SHIRLEY SHAW, and NETTIE AMATO, *Plaintiffs-Appellants,*

v.

ZOHN MANUFACTURING COMPANY, formerly known as GROSS WHOLESALE TAILORS, INC., a Colorado corporation; LOCAL 263, AMALGAMATED CLOTHING WORKERS OF AMERICA, a Labor Organization MIDWEST REGIONAL JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization; and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization,

*Defendants-Appellees.*

No. 72-1592

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellants in the above case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Hill and Barrett, and Senior District Judge Smith, of the Eastern District of Michigan, to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By: ROBERT L. HOECKER,
Chief Deputy Clerk

## APPENDIX C

### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

| | |
|---|---|
| ETHEL IMEL, SHIRLEY SHAW, and NETTIE AMATO, *Plaintiffs,* | Civil Action No. C-3556 |
| v. | |
| ZOHN MANUFACTURING COMPANY, formerly known as GROSS WHOLESALE TAILORS, INC., a Colorado corporation; LOCAL 263, AMALGAMATED CLOTHING WORKERS OF AMERICA, a Labor Organization; MIDWEST REGIONAL JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization; and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization, *Defendants.* | Filed July 20, 1972<br>Judgment of Dismissal |

Upon hearing the motion to dismiss and motion for summary judgment, the Court determined that the administrative procedures adopted in the collective bargaining agreement under which plaintiff seeks relief have not been followed by the plaintiffs, and that this action has been prematurely instituted and should be dismissed as to all parties. Therefore, it is

ORDERED that this action and the complaint herein are hereby dismissed; and it is further

ORDERED that the defendants, above-named, have and recover of the plaintiffs, above-named, judgment for their costs to be taxed upon the filing of a Bill of Costs.

DATED at Denver, Colorado, this 20th day of July, 1972.

BY THE COURT:

s/ HATFIELD CHILSON

HATFIELD CHILSON
U. S. District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-3556

ETHEL IMEL, SHIRLEY SHAW, and NETTIE AMATO, *Plaintiffs,*

v.

ZOHN MANUFACTURING COMPANY, formerly known as GROSS WHOLESALE TAILORS, INC., a Colorado corporation; LOCAL 263, AMALGAMATED CLOTHING WORKERS OF AMERICA, a Labor Organization; MIDWEST REGIONAL JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization; and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, a Labor Organization.

*Defendants.*

Judgment of Dismissal

(Bears Filing Stamp July 7, 1972)

THIS MATTER having been heard this day upon Motion to Dismiss, and Motion for Summary Judgment, the Court determines that the applicable administrative procedures available to plaintiffs have not been exhausted and this action should be dismissed. Therefore, it is

ORDERED that this action and the complaint herein are hereby dismissed as to all defendants; and it is further

ORDERED that the defendants, above-named, have and recover of the plaintiffs, above-named, judgment for their costs upon the filing of a Bill of Costs to be taxed by the Clerk.

Dated this 7th day of July, 1972.

BY THE COURT:

s/ HATFIELD CHILSON
United States District Judge

IN THE

# Supreme Court of the United States

October Term, 1973

DEC 8 1973
MICHAEL RODAK, JR., CLERK

No. 73-714

ETHEL IMEL, SHIRLEY SHAW, AND NETTIE AMATO,
*Petitioners,*

*v.*

ZOHN MANUFACTURING COMPANY, FORMERLY KNOWN AS GROSS WHOLESALE TAILORS, INC., A COLORADO CORPORATION; LOCAL 263, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, A LABOR ORGANIZATION; MIDWEST REGIONAL JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, A LABOR ORGANIZATION; AND AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, A LABOR ORGANIZATION,
*Respondents.*

## BRIEF IN OPPOSITION ON BEHALF OF LOCAL 263; MIDWEST REGIONAL JOINT BOARD; AND AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

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IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-714

ETHEL IMEL, SHIRLEY SHAW, AND NETTIE AMATO,

*Petitioners,*

*v.*

ZOHN MANUFACTURING COMPANY, FORMERLY KNOWN AS GROSS WHOLESALE TAILORS, INC., A COLORADO CORPORATION; LOCAL 263, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, A LABOR ORGANIZATION; MIDWEST REGIONAL JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, A LABOR ORGANIZATION; AND AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, A LABOR ORGANIZATION,

*Respondents.*

## BRIEF IN OPPOSITION ON BEHALF OF LOCAL 263; MIDWEST REGIONAL JOINT BOARD; AND AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

### QUESTION PRESENTED

In these Respondents' view, a more accurate statement of the real question presented by the Petition filed herein than that set forth in that Petition would be framed as follows:

Where a member of a local labor union charges that local union with inadequate representation, but concedes that

neither the national union with which the local is affiliated, nor any of its officials, were involved in the events giving rise to his claim, must the member submit the matter for review to the national union, as required by the national constitution which governs the local and all members, before instituting suit under the provisions of § 301 of the Labor-Management Relations Act (129 U.S.C. § 185) against either union?

## COUNTER-STATEMENT OF THE CASE

In the "Statement of the Case" contained within the Petition (pp. 3-5 thereof), there is a failure to distinguish between the basis for the claim asserted against the Amalgamated Clothing Workers of America, AFL-CIO (herein "Amalgamated"), and the basis for the claims asserted against the other two labor organizations, i.e., Midwest Regional Joint Board (herein "Joint Board") and Local 263. Since the claim of Petitioners against Amalgamated, on the one hand, and their claims against the Joint Board and Local 263, on the other, were fundamentally different, and since this difference played a large role in the decision of the Court of Appeals, these Respondents are of the view that a proper disposition of this cause requires that that distinction be recognized. Petitioners' "Statement of the Case" having failed to do so, these Respondents supplement their statement thereof in the following particulars:

Amalgamated is a national labor organization with which numerous local unions are affiliated. In addition, there are intermediate organizations, known as "joint boards," with which each local union is affiliated. Both Local 263 and the Joint Board are affiliates of Amalgamated.

All such affiliates, and their members, are governed both by Amalgamated's Constitution and the constitutions and by-laws of the pertinent local union and joint board.

As noted by the Court of Appeals in its opinion (pp.

A4-A5, Appendix A to Petition), Amalgamated's Constitution provides a procedure for a member of any local union to have the "action or failure to act" of such organization reviewed by the General Executive Board of Amalgamated, itself. Indeed, Amalgamated's Constitution contains specific, express provisions requiring any member who feels he is aggrieved by any such action or inaction to exhaust such procedures before instituting any legal action against either Amalgamated or any of its affiliates.

The Joint Board and Local 263 entered into a collective bargaining agreement with Zohn Manufacturing Company (herein "Zohn"), the terms of which governed the wages, hours of work and other working conditions of certain employees of Zohn in Denver, Colorado, represented by Local 263. This agreement contained provisions providing for the arbitration of grievances and disputes arising thereunder.[1]

Petitioners, who were employees in the unit covered by this contract and members of Local 263, presented two grievances to Local 263 and the Joint Board, alleging, in essence, that Zohn had violated the provisions of this agreement by paying them less than the wage rate called for by that contract and by misinterpreting certain provisions thereof relating to job classifications.

Local 263 and the Joint Board elected to arbitrate the matter of job classifications, but declined to submit to arbitration the issue of underpayment of wages.[2]

As a result, Petitioners filed a complaint against Zohn, Local 263, the Joint Board and Amalgamated in the United

[1] It is conceded that Amalgamated was not a party to this agreement. Indeed, there is no allegation that either Amalgamated or its authorized representatives had any hand in its negotiation.

[2] The judgment in the trial court was entered pursuant to motions for summary judgment filed by these Respondents, which were not based upon the substance of the allegations of the Petitioners' Complaint. There is no evidence within the record, therefore, which discloses the reasons for the refusal of Local 263 and the Joint Board to submit this wage dispute to arbitration.

States District Court for the District of Colorado, relying upon § 301 of the Labor Management Relations Act (Tit. 29 U.S.C. § 185). The material allegations of this complaint were as follows:

a. Zohn breached the provisions of the pertinent bargaining agreement by failing to pay to Petitioners the wages required to be paid to them by the terms of that agreement;

b. Local 263 and the Joint Board arbitrarily and capriciously refused to submit their grievances to abritration; and

c. Amalgamated is legally responsible for the actions of Local 263 and the Joint Board by reason of the doctrine of respondent superior.

All three of these Respondents filed motions for summary judgment, supported by affidavits. Each of them alleged that Petitioners could not maintain the action against it because they had failed to exhaust the internal appeal procedures established by Amalgamated's Constitution. In addition, Amalgamated asserted that none of its authorized agents had any hand in any of the events alleged in the Complaint and, as a consequence, it could not be derivatively liable for the actions of Local 263 or of the Joint Board.[3]

The district court granted judgment to these Respondents on their motions for summary judgment, based solely upon Petitioners' failure to exhaust the remedies provided to them under Amalgamated's Constitution, and the Court of Appeals affirmed that portion of the district court's judgment. Neither court reached the substantive issue of the derivative

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[3] As noted in the opinion of the Court of Appeals (p. A5 of Appendix A of the Petition), Petitioners conceded, in the district court, that: "It is true we do not suggest that any employee or officer of Amalgamated as such had anything to do with the events which led to the filing of this Complaint". Although Petitioners filed counter-affidavits in response to these Respondents' motions, nowhere in any of the documents filed with the district court, did Petitioners assert, or provide any factual basis for the conclusion, that an appeal by them to Amalgamated would be futile.

liability of Amalgamated for the actions of Local 263 and of the Joint Board.

## SUMMARY OF THE ARGUMENT

The substantive law to be applied in an action brought pursuant to the provisions of § 301 of the Labor-Management Relations Act must be formulated by the federal and state judiciaries based upon the tenets of the national labor policy, as that policy has been enunciated in the various federal enactments, or to be found within their "penumbra."

One of the most basic of these principles is that the judiciary should not interfere with internal affairs of a labor organization until the organization has had an opportunity to resolve any dispute concerning such matters, itself.

There are, to be sure, exceptional circumstances justifying judicial interference prior to the time that a local union member has exhausted the internal remedies granted to him. Thus, the requirement for exhaustion of internal remedies cannot be applied in such a way so as to restrict a member's rights under § 7 of the National Labor Relations Act (Tit. 29 U.S.C. § 157), or to restrict his freedom to utilize the services of the National Labor Relations Board to enforce such rights. Likewise, where it clearly appears that an appeal by the member to the internal tribunal would be utterly futile, because of the prejudice or bias of that tribunal, the member will not be required to perform a useless act.

In the absence of such exceptional circumstances, however, a union member will not be excused from performing those obligations contained within his organization's governing documents which the member assumed when he accepted membership in the organization.

The case presented by Petitioners here disclosed no such exceptional circumstances, either by pleading or by proof. The Court of Appeals for the Tenth Circuit, consistent with other federal and state decisions upon the issue, correctly

determined that Amalgamated and its affiliates should be given an opportunity to resolve Petitioners' complaints internally prior to judicial interposition.

## ARGUMENT

Section 301 of the Labor-Management Relations Act (Tit. 29 U.S.C. § 185) intends that the judiciary must formulate a federal common law, to be applied by both federal and state courts, and that this federal common law be based upon the national labor policy as disclosed in national legislation. *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 77 S.Ct. 912 (1957). Under this statutory provision, an employee whose employment is subject to the provisions of a collective bargaining agreement may not institute suit against his employer for breach of that agreement, unless he can establish that he has attempted to make use of any contractual grievance procedures set forth in that agreement, but has been thwarted in his attempt by the arbitrary, capricious or invidiously discriminatory actions of his union. *Republic Steel Corporation v. Maddox,* 379 U.S. 650, 85 S.Ct. 614 (1965) and *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903 (1967). If, however, the employee's evidence establishes both a breach of contract by the employer and arbitrary action by his bargaining agent, he is entitled to proceed in an action against both to obtain relief against both. *Vaca v. Sipes,* supra.

Nothing within these precepts, however, relieves the member from his obligation to pursue the internal procedures and remedies provided for within his union's constitution, in the absence of a showing of some exceptional circumstance justifying his failure to utilize these procedures. And, we submit, the mere naked allegation that a *subordinate* body has treated the member arbitrarily cannot justify a failure to submit his complaint to the *national* organiza-

tion, particularly where, as here, the member concedes that the national organization has had nothing to do with the events leading to his complaint.

Indeed, both prior, and subsequent, to this Court's decision in *Vaca*, supra, the various courts of appeal which have had occasion to pass upon the matter have been substantially uniform in holding that, as a general rule, a claim of a member based upon an allegation of inadequate representation by his local union, must, where required by the pertinent constitution, be submitted to the national organization for review before the institution of legal action. *Brady v. Trans World Airlines*, 401 F.2d (3rd Cir., 1968), cert. den. 393 U.S. 1048 (1969); *Bsharah v. Eltra Corporation*, 394 F.2d 502 (6th Cir., 1968); *Fingar v. Seaboard Air Line Railroad Company*, 277 F.2d 698 (5th Cir., 1960); and *Gainey v. Brotherhood of Railway and Steamship Clerks*, 275 F.2d 342 (3rd Cir., 1960).

In *Fingar v. Seaboard Air Line Railroad Company*, supra, for example, the Fifth Circuit noted that, where the constitutional remedies provide for an appeal to the *national* organization, failure to institute such an appeal is not excused by an allegation that *local* officials are hostile to the member. *Brady*, supra, reaches a like conclusion.

There can be no question, then, but what there has been general recognition given to the principle that a necessary condition precedent to a member's action against his union is the exhaustion by him of any internal appeal procedures provided for in the organization's constitution.[4]

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[4] In their petition, Petitioners complain that a like rule is not applied to employees in the bargaining unit who are *not* union members. This is obviously true — but neither do non-members obtain the benefits of union membership. Petitioners, having chosen to receive such benefits, are, likewise, subject to the obligations attendant upon their membership in the union.

Of course, there are exceptions to this principle. One such exception finds its genesis in the necessity of requiring a member's constitutional obligation to his union to yield to the paramount public concern in the exercise by him of his Section 7 rights. The articulation of this exception to the general principle is to be found in this Court's opinion in *N.L.R.B. v. Shipbuilding Workers, Local 22*, 391 U.S. 418, 88 S.Ct. 1562 (1968).

In that case, an internal union tribunal penalized a member because he filed charges against the union with the National Labor Relations Board without first exhausting his internal appeal procedures, as required by the constitution. Recognizing the paramount public interest in encouraging free access to the Labor Board by employees, this Court concluded that restrictions upon this free access, except in a case involving a "plainly internal affair," is contrary to public policy.

The case at bar, however, does not involve any public interest with which the National Labor Relations Board has been entrusted; the only rights which Petitioners here seek to enforce are those arising out of a collective bargaining agreement. Petitioners' case obviously does not fall within the ambit of the *Shipbuilding Workers* case.

Another exception to the general rule requiring exhaustion is where the member can demonstrate that, due to the bias, prejudice or hostility of the members of the tribunal to which he must submit his grievance, requiring him to utilize such procedures would be an act of futility, and is exemplified by the decision in *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 89 S.Ct. 548 (1969). There, the claim was made that the employer had violated the provisions of a bargaining agreement by the assignment of white apprentices, rather than black carmen, to do certain work;

that complaints had been made to representatives of the Brotherhood of Railway Carmen, which was the employees' bargaining agent, about the matter; that the Brotherhood had, nevertheless, condoned the employer's actions; and that the members instituting suit had been advised by the Brotherhood's representatives, on numerous occasions, that the members involved would never "get white men's jobs," that "nothing would ever be done for them," and that "to file a formal complaint with the Brotherhood or with the Company would be a waste of their time."

Based upon these allegations, together with others, the *Glover* court concluded that the plaintiffs there had demonstrated that an attempt by them to exhaust either the grievance procedures of the contract, or the internal procedures of the Brotherhood's constitution, would be futile. Their suit against both the employer and the Brotherhood was allowed to proceed without requiring them to attempt to utilize these procedures.

The issue of any consequence presented to the lower courts, then, was whether Petitioners' pleadings and affidavits made out a case controlled by *Glover*, or whether it fell within the parameters of the general rule requiring exhaustion.

The Tenth Circuit's decision that Petitioners did not present a *Glover*-type factual circumstance is clearly correct.

Amalgamated's Constitution contemplates that, in the typical case, a member who is aggrieved by a local union's action or inaction should appeal, first, to that local union, itself, then to the joint board, and, finally, to Amalgamated. However, that constitution also permits a direct appeal to Amalgamated's General Executive Board without exhausting the intermediate steps.

While Petitioners' complaint alleged "collusion" between

Zohn, Local 263 and the Joint Board, the real basis for Petitioners' justification for their refusal to appeal, either to Local 263 or to the Joint Board, respecting this matter was their claim that the representatives of these two bodies would be disqualified from passing upon Petitioners' claims because of their "prior knowledge" of the matter.

At the same time, however, there was no allegation of any nature that any representative of Amalgamated was guilty of any active wrongdoing against Petitioners; the only claim asserted against Amalgamated, itself, was based upon the theory that Amalgamated was liable to Petitioners for the actions of representatives of Local 263 and of the Joint Board, under the doctrine of respondent superior. Indeed, Petitioners conceded that no "employee or officer of Amalgamated as such had anything to do with the events" upon which the allegations of the complaint were based.

Given this undisputed factual framework, the Court of Appeals concluded that Petitioners had failed to show any justification for their failure to allow Amalgamated's General Executive Board to pass upon their claims of wrongdoing by representatives of its local affiliates (and to require corrective action to be taken, if found warranted by the circumstances) before instituting legal action against the three organizations.

It is respectfully submitted that the lower court's conclusion in this regard is in full accord with the decisions of the other circuits upon similar issues and is in nowise inconsistent with the principles announced by this Court in either *Glover* or *Shipbuilding Workers, Local 22*.

Under these circumstances, there is no valid basis for the grant by this Court of its writ of certiorari.

## CONCLUSION

The Petitioners having failed to show any justification for a departure in this case from the generally recognized rule that a member of a labor organization must exhaust the remedies provided to him by that organization's constitution before resorting to the courts, it is respectfully submitted that their Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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